

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLENN EMMETT MARSHALL,

Defendant-Appellant.

UNPUBLISHED

March 6, 2007

No. 266585

Macomb Circuit Court

LC No. 2005-000153-FC

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sentenced to a prison term of 70 to 240 months. He appeals by right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the prosecutor made improper statements during her closing and rebuttal arguments, depriving him of a fair trial. Because defendant did not preserve this issue by objecting to the prosecutor's statements at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id.* at 448-449. We will not find error requiring reversal when a curative instruction could have alleviated any prejudice. *Id.* at 449.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 594; 629 NW2d 411 (2001). "A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Further, "[a] prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman, supra* at 450.

Defendant first argues that the following remarks during closing argument were improper:

One of the things, I don't want to beat a dead horse, but when the officer explained this also, why somebody doesn't testify or why somebody doesn't come

forward and tell somebody that this happened. All of you sat through jury selection. There are people on this jury that have had loved ones that were sexually assaulted.

And I believe that the judge asked them and I know that one of the jurors that was excused had said that one of her close friends were [sic] sexually assaulted and they didn't go to the police, they never did. It's not an uncommon happening. It's not something that is insurmountable. When you're considering your duty to convict beyond a reasonable doubt for me to prove this beyond a reasonable doubt, Mr. Haradhvala went through the different standards of proof that we have in different cases and this is the highest burden of proof, the criminal burden of proof beyond a reasonable doubt.

Although it was improper for the prosecutor to rely on a juror's statements during voir dire as support for her argument, the prosecutor's remarks were independently supported by the testimony of a police detective, who testified that it is not uncommon for victims of sexual abuse to delay reporting sexual abuse. So, any error did not affect defendant's substantial rights.

Defendant argues that the prosecutor again improperly referred to another prospective juror's comments during voir dire when making the following remarks in her rebuttal argument:

If somebody -- if there was a motive to lie and if this mother is really putting her up to lying and she was lying, she's 13. And I think it was one of the jurors that said when you tell somebody the same thing and when they're younger kids, they'll just repeat it but not older kids. She's 13. She's not going to say and repeat exactly the same thing.

To the extent that the prosecutor again improperly referred to a juror's voir dire commentary, reversal is not required. First, the prosecutor's remarks were responsive to defense counsel's closing arguments about the victim fabricating the charged incident and having a motive to lie. Otherwise improper remarks do not require reversal if they are made in response to defense counsel's argument. *Watson, supra* at 593. Second, the prosecutor's comments were generally based on the evidence and common experience regarding the nature of children. See *Ackerman, supra* at 450. The prosecutor did not require testimony to support her argument that younger children are easier to influence and convince to lie than older children. Third, any perceived prejudice could have been cured by an appropriate instruction upon request. Therefore, reversal is not warranted. *Id.* at 449.

Defendant also argues that the prosecutor improperly urged the jury to sympathize with the victim in the following remarks during closing argument:

And like I said, you have to put yourself in her [the victim's] mindset. Imagine yourself coming in here when you go back to the jury room, imagine yourself walking into that room having never met any of your peers, any of the 11 other people that will be in that room and try to discuss like Detective Furno said, the last consensual sex you had in detail. Remembering what you had on that day or at that time and what your partner did.

And try to remember that if you could do that, let alone a sexual encounter against your will when you're eight and it's five years later. Imagine that sex act that took place five years ago and try to remember what you were wearing. Then, add the fact that it's against her will and the person that did this to you is in the same room.

A prosecutor may not appeal to the jury to sympathize with the victim. *Watson, supra* at 591. It is generally inappropriate for the prosecutor to ask the jurors to place themselves in the role of the complainant when arriving at a verdict. *People v Buckey*, 133 Mich App 158, 167; 348 NW2d 53 (1984), rev'd on other grounds 424 Mich 1 (1985). Here, the prosecutor's comments were meant to emphasize to the jury the factors that may have affected the victim's ability to recall the incident, not to sympathize with the victim. See *People v Howard*, 226 Mich App 528, 546-547; 575 NW2d 16 (1997). The prosecutor's comments were not a blatant attempt to get the jurors to sympathize with the victim; their purpose was to place the victim's trial testimony in context. Because the comments were not so inflammatory as to prejudice defendant, plain error has not been shown.

Defendant next argues that the cumulative effect of the prosecutor's improper remarks requires reversal. In order to reverse on this basis, the effect of the errors must be seriously prejudicial to the defendant's right to a fair trial. *Ackerman, supra* at 454. The prosecutor's remarks, considered cumulatively, did not deny defendant a fair and impartial trial.

Defendant also argues that his attorney was ineffective for not objecting to the prosecutor's arguments. Because defendant did not raise this issue below, our review is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied a fair trial. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). "Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different . . ." *Id.*

Here, there is no reasonable probability that the result of defendant's trial would have been different had counsel objected. Defendant has not established that trial counsel was ineffective. *Ackerman, supra* at 455.

Defendant argues that he is entitled to be resentenced because the trial court relied on facts not found by the jury when scoring the sentencing guidelines contrary to *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. In *People v Drohan*, 475 Mich 140, 143, 164; 715 NW2d 778 (2006), our Supreme Court determined that *Blakely* and *Booker* do not apply to Michigan's indeterminate sentencing scheme. Thus, defendant is not entitled to resentencing.

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder